IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
SECOND APPEAL NO.333 OF 1996

1. Zilla Parishad, Solapur
through its Chief Executive
Officer, Solapur.

2. The Parishad Education Officer,
Primary Section, Zilla Parishad,
Solapur. ..Appellants
(Org.Defts.)

Versus

Ananadrao Chandram Hegde,
aged 56 years, Occupation nil,
residing at Block No.52,
Shanti Nagar Hsg. Soc. Solapur. ..Respondent
(Org. Plff.)

Mr.Nitin Jamdar for appellants.
Mr.Mukesh V. Aiya for respondent.

CORAM: B.H.MARLAPALLE,J.

November 17, 2004.

ORAL JUDGMENT :

1. While admitting the Second Appeal on 16-12-1996, this Court framed the following substantial questions of law:-

(a) Whether it was open for the Civil Court to grant reinstatement to the plaintiff - respondent in view of Section 24 of the Bombay Primary Education Act, 1947;

(b) Whether the Civil Court had jurisdiction to grant reinstatement on sympathetic consideration; and

(c) Whether the Suit instituted by the plaintiff was hit by limitation as set out in Section 280 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 (the "Z.P. Act" for short).

2. The brief facts leading to this Second Appeal are that the respondent-plaintiff was issued the show cause notice dated 17-2-1987 (Exh.52) by the Chief Executive Officer of Zilla Parishad, Solapur proposing to proceed to take disciplinary action under Rule 4 of the Maharashtra Zilla Parishad, District Services (Discipline and Appeal) Rules, 1964 against the plaintiff (for short "the D. & A. Rules"). The plaintiff was called upon to show cause whey he should not be removed from service on account of his continuous absence from 20/8/1986. Subsequently by the order dated 8-4-1987 (Exh.53) the plaintiff came to be dismissed from service on account of his unauthorised absence from 7-6-1979 to 18-6-1986 continuously. The plaintiff submitted an application dated 7-8-1987 (Exh.51) contending that

the action of dismissal from service with effect from 7-6-1979 was illegal and in any case he should be allowed to retire voluntarily taking into consideration his service of 38 years. The Zilla Parishad vide its order dated 27-8-1987 rejected the application for voluntary retirement on the ground that the plaintiff was already dismissed from service as per the order dated 8-4-1987. On 14-7-1988 the plaintiff submitted a representation to the Chief Executive Officer of the Zilla Parishad which was received by it on 19-7-1988 and prayed for the monetary benefits available on retirement. As there was no response from the Zilla Parishad the plaintiff sent the notice dated 13-9-1988 through his Advocate and challenged the action of dismissal. He approached the Civil Court and filed Regular Civil Suit No.666 of 1990 and prayed for the following reliefs:-

(A) That it be declared that the order of the deft. No.2 dt. 27/8/87 declaring that pltf. is dismissed from his service on 7/7/1979 is illegal, void and discriminatory;

(B) That it be declared that pltf. is

entitled for the reliefs of his usual retirement as to pension, gratuity etc.;

(C) That the total cost of this suit be awarded to him.

The Zilla Parishad filed the Written Statement under the signature of the Education Officer and opposed the suit on the preliminary point of maintainability as well as merits. While defending the action of dismissal the Zilla Parishad contended that the suit was not maintainable as the plaintiff had an alternative remedy under Section 24 of the Bombay Primary Education Act, 1947 wherein the remedy of an appeal under Chapter V of the Bombay Primary Education Rules, 1947 was provided and thus the jurisdiction of the civil court was impliedly barred under Section 9 of C.P.C. The plaintiff stepped in the witness box and examined himself as PW 1 and in addition he also examined Shri Shivaji Goranti, PW 2. Though the defendants submitted the documentary evidence before the trial Court, none was examined on their behalf. The trial Court on appreciation of the evidence and considering the rival arguments held that the dismissal order from service dated 8-4-1987

passed by the Zilla Parishad was illegal, void and arbitrary and that the plaintiff was entitled to retire voluntarily on 9-4-1987 but with effect from 1-6-1987. The preliminary objections regarding the maintainability of the suit and limitation raised by the defendants were rejected. The operative part of the decree passed by the 4th Joint Civil Judge Junior Division at Solapur on 16/3/1993 reads as under:-

> "(a) It is hereby declared that the order of dismissal dated 8-4-1987 passed by the defendants is illegal, void, arbitrary and not binding on the plaintiff.
>
> (b) It is further declared that the plaintiff is entitled to get all the benefits of his service as per rule such as pension, gratuity and refund of Provident Fund amount to his credit as if the plaintiff got retired on 1-6-1987."

3. The defendants filed Civil Appeal No.444 of 1993 and the same came to be dismissed by the learned 4th Additional District Judge at Solapur on 30-6-1995. The lower Appellate Court held that the

findings recorded by the trial Court on the issue of voluntary retirement were unsustainable as the plaintiff had not prayed for such a relief, but proceeded to confirm the decree passed by the trial Court.

4. As per the record maintained by the Zilla Parishad the date of birth of the plaintiff is 23-12-1931 and he joined the service of the Zilla Parishad as a teacher in a primary school on 20-12-1948. He came to be promoted to the post of Head Master of the Primary School in 1978. He remained absent from duty continuously from 7-6-1979 to 18-6-1986 and he admitted in his cross-examination that his leave was not sanctioned for the said period. He was transferred from Taratgaon Primary School to the Primary School in Bathan, Taluka Mangalwedha by the order dated 8/7/1986 and he handed over his charge of Head Master at Taratgaon School on 8-7-1986 and reported at the Primary School at Bathan on 17-7-1986. He was issued the notice dated 21-9-1981 and also the charge-sheet for remaining absent (Exh.54). No further action was taken consequent to this charge-sheet till the plaintiff reported for duty on 17-7-1986 at the transferred

posting.

5. The trial Court held that the show cause notice dated 17-2-1987 was for the absence from duty from 20-8-1986 and the plaintiff was called upon to show cause why he should not be dismissed from service under Rule 4 of the Discipline and Appeal Rules, 1964, but he was dismissed from service with effect from 7-6-1979 on the grounds that he remained absent without leave from 7-6-1979 to 18-6-1986 and from 18-7-1986 onwards continuously. Thus the dismissal order was beyond the scope of the show cause notice. Secondly the trial Court held that when the action under rule 4 of the Discipline and Appeal Rules was proposed but the procedure as set out under Rule 6 of the said Rules was not followed before the order of dismissal was passed and, therefore, the dismissal order was illegal and arbitrary. This finding of the trial Court has been confirmed by the lower Appellate Court and there is no dispute that the procedure as laid down under rule 6 of the Discipline and Appeal Rules was not followed by the defendants before the order of dismissal was issued on 8-4-1987. On the point of alternative remedy in view of Section 24 of the Bombay Primary

Education Act, 1947 it requires to be noted that the said section is applicable to the Primary Schools run by the Municipal Councils / Corporations and not to the Primary Schools run by the Zilla Parishads. The reliance of the defendants on the said provision to oppose the suit as not maintainable was thus totally misplaced. The learned counsel for the defendants while arguing the second appeal submitted that the Zilla Parishad employees were covered by the Discipline and Appeal Rules, 1964 which provide the remedy of appeal, revision and review against the order of punishment imposed under rule 4 thereunder and, therefore, the suit filed was not maintainable unless the departmental remedy was exhausted. There is no doubt that the order of dismissal passed by the Chief Executive Officer of the Zilla Parishad is appealable before the Divisional Commissioner under Rule 13(1)(e) and under Rule 15(1)(c) there is a further remedy of revision against the order of the Divisional Commissioner, before the State Government. Rule 16 prescribes the period of limitation for appeals and revisions and Rule 17 sets out the form and contents of the appeal and revision application. Rule 18 states that every appeal and revision application shall be submitted to the appellate or

revisional authority through the authority in respect of whose order appeal or revision application is made with a copy of the respective proceedings to be submitted direct to either of the authorities. Rule 21 deals with the consideration of appeals and revisions including the powers of the respective authorities. Rule 24 provides for review against the order of the Chief Executive Officer, the Division Commissioner as the case may be. No doubt the said remedy as provided under the Discipline and Appeal Rules is efficacious and speedy remedy so as to draw an inference that the suit could be impliedly barred before such remedy was exhausted but at the same time it requires to be noted that the defendants did not rely upon the scheme of the said Rules in support of their contentions that the suit was not maintainable. When such an issue was not raised before the Courts below, it would not be permissible to entertain such a challenge in this second appeal for the first time.

5A. On the ground of limitation by relying upon the Scheme of Section 280 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 viz. that the suit was required to be filed within three months from the date of dismissal order, the learned counsel

for the appellants fairly conceded that the said issue stands decided by the decision in the case of J.N. Ganatra vs. Morvi Municipality **[1996 (9) SCC 495]**, inasmuch as if the order of dismissal was in breach of the procedure prescribed under Rule 6 of the Discipline and Appeal Rules, the Zilla Parishad was not entitled to agitate the issue of limitation as set out under Section 280 of the Z.P. Act. Both the Courts below have recorded a concurrent finding of facts that the dismissal order was passed without compliance of the procedure set out under Rule 6 of the Discipline and Appeal Rules and, therefore, the appellants cannot be allowed to agitate the issue of limitation and thus the third substantial question of law framed by this Court stands rejected.

6. The last substantial question of law framed in this appeal is regarding the powers of the Civil Court to grant reinstatement on sympathetic grounds. From the operative part of the decree as reproduced hereinabove it is clear that no such relief has been granted by the trial Court and in the said decree the first part pertains to the declaration of the order of dismissal dated 8-4-1987 as being illegal, void, arbitrary and not binding on the plaintiff whereas in

the second part there is a declaration that the plaintiff is entitled to get all the benefits of his service such as pension and gratuity and refund of provident fund amount to his credit as if he retired on 1-6-1987, as per rules. It also requires to be noted that as on the date the decree was passed by the trial Court i.e. on 16-3-1993 there was no question of reinstatement being granted in view of the fact that the plaintiff attained the age of superannuation i.e. 58 years on 22-12-1989. Under the circumstances, the issue regarding the civil court's powers to grant reinstatement on sympathetic grounds would not arise at all leave alone it being a substantial question of law warranting a decision by this Court.

7. However, this appeal raises an additional issue in the form of a substantial question of law to be decided viz. the legality of the second part of the decree i.e. a declaration that the plaintiff got retired on 1-6-1987. Though the lower Appellate Court, as noted earlier, held that the view taken by the trial Court on this issue of voluntary retirement was unsustainable it did not vary the decree impugned before it and on the contrary it held that the decree

passed by the trial Court was required to be maintained and there was no reason to interfere with the said decree. Both the parties have been heard on this issue and it was pointed out to them from the plaint memo that the plaintiff had not prayed for such a declaration viz. that he was entitled to be allowed to retire voluntarily on 1-6-1987. The plaintiff has no doubt prayed for a declaration that he was entitled for all the benefits including the pensionary benefits on retirement. When the lower Appellate Court held and rightly so, that the findings recorded by the trial Court on the issue of voluntary retirement were uncalled for, it was necessary to modify the decree under challenge.

. Secondly even if the order of dismissal was declared to be illegal, though it was not so prayed for in the plaint, that by itself would not prohibit the employer from proceeding against the plaintiff on the basis of the charge of remaining absent continuously without leave or abandoning his service so as to take action under rule 4 of the Discipline and Appeal Rules. The declaration so made cannot act as an estoppel against the employer's right to proceed further by following the procedure set out

under rule 6 of the Discipline and Appeal Rules. If ultimately on following the said procedure the Zilla Parishad is satisfied to award the punishment of dismissal, obviously the plaintiff would not be entitled for the pensionary benefits as are available to the Zilla Parishad employees under the Maharashtra Civil Services (Pension) Rules, 1982. By the interlocutory order dated 16-12-1996 passed in Civil Application No.4727 of 1996 this Court directed the appellants to deposit an amount of Rs.60,000/- in the trial Court within four weeks with permission to the plaintiff to withdraw the said amount and further directed the appellants to go on paying pension at the rate of Rs.375/- per month to the respondent from 1-1-1997 and on those conditions the impugned orders were stayed. Obviously the pensionary benefits would be subject to the employer's right to proceed against the employee de novo and this right of the employer cannot be taken away by the Civil Court even though the order of dismissal is declared to be illegal, arbitrary and not binding on the plaintiff. The learned counsel for the plaintiff at this stage submitted that during the pendency of this appeal for about nine years the appellants did not initiate de novo proceedings and the plaintiff has by now crossed

the age of 70 years and, therefore, it would not be permissible for the appellants to proceed further under rule 6 of the Discipline and Appeal Rules. It is also contended that by the action of the appellants the right to proceed against the plaintiff de novo has been waived by them. These submissions have no merit. The plaintiff's right for pensionary benefits is subject to the final outcome on the proceedings started from the show cause notice dated 17-2-1987 or any other earlier show cause notice / charge-sheet as may be permissible in law or the Discipline and Appeal Rules. The interim order passed by this Court on 16-12-1996 cannot be read as finally adjudicating the plaintiff's right for pensionary benefits. It is for the appellants to decide whether they would like to proceed further or close the chapter but in case they are desirous of proceeding against the plaintiff de novo, such a right cannot be curtailed or the employer cannot be prevented from proceeding further into the charge of absence without leave against a public servant.

8. Thus the appeal partly succeeds and the impugned decree is confirmed to the extent of the declaration against the dismissal effected vide the

order dated 8-4-1987 and the second part of the decree regarding voluntary retirement from 1-6-1987 including the declaration for retiral benefits is hereby set aside. The suit filed by the plaintiff is partly allowed and decreed in the following terms:

It is hereby declared that the order of the defendant no.2 dated 27/8/1987 declaring that the plaintiff is dismissed from his service on 7/6/1979 is illegal, void and discriminatory.

. The pensionary benefits of the plaintiff shall be subject to the final outcome of the de novo enquiry proceedings under Rule 6 of the Discipline and Appeal Rules in respect of the charge of absence without leave, as may be initiated by the appellants. If such de novo proceedings are not initiated within a period of four weeks from today, it shall be deemed that the appellants have exonerated the plaintiff and consequently he would be deemed to have retired on reaching the age of superannuation on 22-12-1989 and shall be entitled to the retiral benefits as per the rules.

9. The appeal is partly allowed in terms of the above order with no order as to costs.

10. Certified copy is expedited.

(B.H.MARLAPALLE,J.)